

In the Supreme Court of the United States

OCTOBER TERM, 1924

A. W. DUCKETT & COMPANY, INC., APPEL-	} No. 108
lant	
v.	
THE UNITED STATES	

APPEAL FROM THE COURT OF CLAIMS

BRIEF ON BEHALF OF THE UNITED STATES

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Court of Claims dismissing the petition upon findings of fact made after trial of the issues.

Duckett & Company sued the United States in the Court of Claims, according to paragraph 2 of Petition (page 1) "upon an implied contract with the Government of the United States under the general jurisdiction of this court" conferred by section 145 of the Judicial Code. That court concluded that no contract had been shown and for that reason dismissed the petition.

THE FACTS

Duckett & Company was a New York corporation engaged in the shipping business (First Finding, page 8), and on December 31, 1917, was in possession of a pier known as Pier 8 under a lease from the Bush Terminal Company, which had been executed on the 19th day of September, 1916, for a period of three years beginning on the first day of October, 1916, at an annual rental of \$60,000. (Second Finding, page 11.)

From August 24, 1917, to February 11, 1919, part of the period involved, the business of Duckett & Company was in the hands of John S. Sheppard, Jr., receiver, appointed by the Judge of the District Court of the United States for the Southern District of New York.

The Bush Terminal, owned and operated by the Bush Terminal Company, consisted in part of eight large piers, numerous large warehouse buildings, and railroad tracks extending from main-line railroads to said warehouses and on to said piers. (Third Finding, page 9.)

Pursuant to the authority vested in the President of the United States, the Secretary of War, by direction of the President, took possession of the Bush Terminal, including Pier 8, under a general order which appears at length in the Fourth Finding (page 10). This order recites that it is made pursuant to the Act of Congress approved August 29, 1917 (Ch. 418, 39 Stat. 645), and by Section 10 of the Act of Congress approved August 10, 1917 (Ch. 53, 40

Stat. 279), this latter Act being the so-called Lever Act. This order recited that—

possession and control is hereby taken, by direction of the President, of the following described parts of a system of transportation, including storage facilities; that is to say, of those portions of the Bush Terminal docks and warehouse property described in Schedule A and shown on the map of Schedule B, hereto annexed, in New York Harbor, to the end that they may be utilized to the exclusion of all other traffic, so far as may be necessary, and for such time as may be required, for the transportation of troops, war material, and equipment, for the storage of military supplies, * * *. Steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use by the Government of the premises, and also the fair compensation to be paid for the property in the event that the Government shall determine prior to July 1, 1918, to acquire absolute title thereto.

Thereafter, under date of January 3, 1918, the Acting Quartermaster General addressed to the Bush Terminal Company a notice (set forth in full in the Fourth Finding, pp. 10-11) which is practically identical in terms with the order theretofore issued by the Secretary of War.

On December 31, 1917, there was addressed to the General Superintendent of the Army Transport Service a telegram signed by the Acting Quartermaster General, as follows:

An order has been issued by the President this date for taking possession and assuming

control of those portions of the Bush Terminal docks and warehouse property known to you and described in Schedule "A" and shown on the map on Schedule "B" attached thereto. In conformity with said order you will take possession and assume control of the premises from this date. (Fourth Finding, page 11.)

On January 14, 1918, there was served upon the receiver for Duckett & Company by an officer in the Army in charge of the Division of Docks, Wharves, and Terminals a notice set forth in the Fifth Finding (page 12). This notice is headed "Notice to vacate." It recites that by authority of the President of the United States "the Bush Terminal has this day been requisitioned for the use of the embarkation service of the United States Army, and possession thereof has passed to the United States"; that "it is necessary that the Government have full benefit of these premises at the earliest possible date"; that "it is desired, however, not to inconvenience the present occupants to the extent that may bring upon them any extensive financial losses. You will therefore immediately communicate with 1st Lieutenant H. S. Cole, U. S. A., Retired, officer in charge of the Division of Docks, Wharves, and Terminals of this office, and make arrangements for the vacation of the premises now occupied by you." And that "until further notice all payments or moneys due in respect of any period commencing on or after January 1, 1918, will be made to the

Bush Terminal Company for account of the United States."

In consummation of negotiations between the receiver and the officer in charge, the receiver was permitted to remain in possession for the remainder of the month of January, and the United States took actual possession of the pier at midnight of January 31, 1918. (Fifth Finding, page 12.)

When the terminal properties were taken over by the United States a part was in possession of the Bush Terminal Company unleased and a part was under lease. An advance payment of \$1,000,000 was made to the Bush Terminal Company to be applied on compensation for the use of the properties taken, or upon the purchase price in the event the United States should determine prior to July 1, 1918, to acquire title, and a board of appraisers was appointed by the Secretary of War to determine the compensation to be paid the Terminal Company for the use of the properties and also to determine the value of the properties in the event that the United States should conclude to acquire title. These appraisers made an award, which is set forth in the Sixth Finding, page 13.

The report of the appraisers shows that the United States did requisition the temporary use and occupancy of a portion of the premises known as the Bush Terminal; that just compensation for the use and occupancy of that portion of the premises not under lease \$89,807.71 per month, which monthly sum is increased from time to time as the respective

leases for other portions of the premises terminate and as further increased by the monthly reserve rent due to the Bush Terminal as provided by the respective leases (except the lease to Duckett & Company for Pier 8, which reserved rent is reduced from \$5,000 per month to \$2,325 per month), and which reserved rent has heretofore been agreed shall be paid to the Bush Terminal instead of to the respective tenant. After making certain adjustments an award was made as of December 31, 1918, to the Bush Terminal of \$880,963.63. From that amount there was to be deducted all sums collected by the Bush Terminal as rent from tenants who had occupied any of the premises after January 3, 1918, and the just compensation to be paid the Bush Terminal from January 1, 1918, was, for that part of the said premises which were not under lease when the property was taken over, \$89,807.71 per month, and for the remaining portions amounts set forth in a schedule of 45 items, the rentals stated in the schedule being the rentals reserved in the leases of the various tenants except that the rental of Pier 8 was reduced from \$5,000 per month, as provided in the lease, to \$2,325 per month. This award was accepted by the Bush Terminal Company and paid by order of the Secretary of War. (Sixth Finding, page 14.)

The receiver for Duckett & Company paid the Bush Terminal Company the rental as provided in the lease for the month of January, 1918, but paid no rental thereafter. In the latter part of January a bill, in usual course, dated February 1st, for the

February rental was sent to the receiver, who at once wrote the Bush Terminal Company, stating that he had been served with notice to vacate the pier and had arranged with the officer in charge that the pier should be surrendered to the United States on the night of January 31st, and in reply the Bush Terminal Company directed him to destroy the bill.

For the use of the pier in unloading a vessel during the month of January subsequent to the service of the notice to vacate, during which period the receiver had been permitted to remain in possession, he collected and retained the charges. The unloading not being completed until some time in the month of February, the receiver, by authority of the officer in charge, collected the charges and paid that portion thereof to the United States.

For the period beginning February 1, 1918, the United States paid the Bush Terminal Company for the use of all properties taken over, including a payment on the basis of \$2,325 per month for the use of Pier 8, and the Bush Terminal Company accepted the payments made as full compensation for the use of all the properties taken. (Seventh Finding, pp. 14-15.)

At midnight April 30, 1919, the United States vacated Pier 8 and surrendered possession to the Bush Terminal Company, and that company executed to the United States a release set forth in the Eighth Finding (page 15), releasing the United States "from any and all claims from suits, debts, obligations, and liabilities of whatsoever kind and nature

which may arise or may have arisen by reason of occupation of said premises by the United States under requisition by Act of Congress," etc.

On April 12, 1919, Duckett & Company, being advised that the United States would shortly release Pier 8, notified the Bush Terminal Company that immediately upon such release it would take over the pier "as per lease dated September 19, 1916." The Terminal Company on April 17th acknowledged the communication and said:

The United States, as we are advised, proceeded upon the theory that our leases were not extinguished by their action in commandeering our property. If it is your desire to proceed upon that theory, and you will pay to us the rent reserved in your lease, and take credit only for the payment made to us by the Government, we will not object to your going into possession again.

On April 19th the Terminal Company requested of Duckett & Company a speedy reply to its letter of the 17th in order that the matter might be speedily disposed of, and on April 22d Duckett & Company wrote the Terminal Company as set forth in the Ninth Finding (Page 16), taking the position that the Terminal Company was not entitled to the difference between the rent reserved in the lease and the rent received from the Government, and saying:

The seizure of the pier by the Government created a situation whereby you could not fulfill the terms of the lease because you could not give us possession of the pier and therefore

the consideration for the rent reserved failed. We certainly do not intend to pay for what we did not get.

We are content to stand upon the fair ground that the emergency under which the Government seized the pier suspended temporarily the lease between us, but now that the Government is returning the pier we intend to maintain our rights and insist upon possession from the day the Government vacates, under the terms of the lease.

It seems to us that that is the fairest way for both of us to handle the situation, and we are advised that it is our right to demand possession of the pier when the Government vacates.

Thereafter the Bush Terminal Company, being advised by counsel that Duckett & Company had forfeited their rights under the lease and that the Terminal Company was privileged to relet the pier to others, did so relet it. (Ninth Finding, page 16.)

It is to be noted that the order under which the property was taken and other documents in the case recite that the action was taken under both the Act of August 29, 1916, an Army Appropriation Act providing for the possession and control of systems of transportation, in time of war, and Section 10 of the Lever Act, providing for the requisitioning of storage facilities. It is, of course, obvious why both Acts were recited.

The Bush Terminal property partook of the nature of a transportation system and also of a storage

system, and the mentioning of both Acts was a proper precaution. But the Act of 1916 made no provision for ascertainment of the compensation to be paid to those whose property was taken, while the Act of 1917 (the Lever Act), made specific provision. The President was to ascertain the compensation and pay it. In case the owner refused to accept the amount thus fixed, he could receive 75 per cent of it and sue in the District Court for the balance necessary to constitute just compensation and under the Lever Act the jurisdiction of the District Court was exclusive. (*United States v. Pfistch*, 256 U. S. 547.)

The provision in the Army Appropriation Act of August 29, 1916 (39 Stat. 645) was as follows:

The President, in time of war, is empowered through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable.

The plaintiff, bringing its suit in the Court of Claims, chose to base its claim, not upon the Lever Act, but upon the implied contract arising from action taken pursuant to the Act of 1916. The Court of Claims held that it had jurisdiction under this theory of the case. It held, however, in accordance with

well-known precedents, that the facts proved show neither a taking of property within the meaning of that expression as settled by the courts, nor an implied promise to pay.

ARGUMENT

The Court of Claims gave this case most careful consideration, and but little can be added to the opinion of Judge Downey, speaking for that Court. The plaintiff having specifically invoked the general jurisdiction of that court upon an implied contract, the Court properly held that the case must be governed by the principles established with respect to the jurisdiction of that court under such claims. *United States v. North American Trans. Co.*, 253 U. S. 330.

It appears (page 26) that the opinion was prepared before the opinion of this Court in *Omnia Commercial Company v. United States*, 261 U. S. 502, was handed down, but the views expressed are in harmony with the views expressed by this Court in the latter case. Indeed, the cases seem to be strikingly similar.

In the present case, the Court of Claims concluded that upon the facts found there was not such a taking from Duckett & Company of its property as gave rise to an implied promise to pay therefor.

Nothing done by the officers of the United States was, in terms, directed at taking over Duckett & Company's leasehold. The Secretary of War took the docks, piers, and warehouses belonging to the Bush Terminal Company. It was the subject matter

of the plaintiff's lease that was taken, not the lease itself. The notice to the receiver of Duckett & Company made no mention of that company's lease, and did not purport to take it or requisition it. The notice stated that the "Bush Terminal has this day been requisitioned" and that it was necessary that the Government have full benefit of the premises at the earliest possible date. It further stated that it was not desired to inconvenience the present occupants to the extent of bringing upon them any extensive financial losses, and suggested that arrangements be made with the officer in charge for vacating. Thereupon arrangements were made whereby the receiver of Duckett & Company was allowed to remain in possession until the pending occupation of the pier by ships was concluded, and the actual possession of the United States was deferred for a month.

In its dealings with the Bush Terminal Company the Government showed no intention of assuming or taking over the existing leases. If such had been the intention of the parties, of course the United States would have substituted itself for the lessee, paid the rent, and performed the other conditions of the lease. When, however, it took up with the Bush Terminal Company the question of compensation, an agreement was reached whereby the rental paid for this pier was reduced from \$5,000 a month to \$2,325 a month, and that rent was thereafter paid to the Bush Terminal Company and not to Duckett & Company or its receiver. It does not appear that any contention was made at this time by the receiver that

Duckett & Company's leasehold was being commandeered or otherwise taken; and when the war was over and the United States terminated its possession of the premises, Duckett & Company took the position that its lease had not been extinguished, but merely temporarily suspended. No other construction can be put upon the letter which Duckett & Company wrote the Terminal Company on April 22, 1919, in which they said:

We are content to stand upon the fair ground that the emergency under which the Government seized the pier suspended temporarily the lease between us, but now that the Government is returning the pier we intend to maintain our rights and insist upon possession from the day the Government vacates, under the terms of the lease.

It seems to us that that is the fairest way for both of us to handle the situation.

We have, therefore, a situation where the United States requisitioned and took the physical property belonging to the Bush Terminal Company; recognized that company's title and ownership; proceeded in a lawful manner to adjust the matter of compensation; reached an amicable agreement with that company and paid that company the agreed compensation. It never recognized any title in Duckett & Company or its receiver, much less any obligation on its part to pay Duckett & Company. It must be remembered that the Duckett lease was made subsequent to the Act of Aug. 29, 1916, and was, there-

fore, subject to the exercise by the Government of the powers conferred by that Act. It does not appear that any protest was made by the receiver or that he at that time asserted any claim based upon a taking of the property in his possession. There is nothing which indicates that Duckett & Company and its receiver claimed that their property was being taken, or that the officers of the United States promised or expected to pay. Certainly, there was no express promise, and under the authorities it does not seem that there was an implied promise. It is not the actual taking or using of property which constitutes such a "taking" as gives rise to the implied contract to pay which must be the basis of a recovery in the Court of Claims. *Tempel v. United States*, 248 U. S. 121; *Hill v. United States*, 149 U. S. 573; *Langford v. United States*, 101 U. S. 341; *Omnia Commercial Company v. United States*, 261 U. S. 502.

In the *Tempel* case the United States assumed that it had the right to submerge and navigate over and further dredge the plaintiff's land, which facts, it was held, precluded the implication of a promise to pay, although the United States did in fact dredge and submerge and in fact take plaintiff's land.

In the *Hill* case the United States asserted a right to the use of the land in question as against the plaintiff, and it was held that the action should have been dismissed for want of jurisdiction.

In the *Langford* case it was held that where an officer of the Government asserted ownership in the

United States and takes forcible possession of the land of the individual for the use of the Government there does not arise such an implied contract to pay as is necessary to give the Court of Claims jurisdiction.

In the present case the claim of the United States was that it had acquired this property from the Bush Terminal Company, and that by virtue thereof it was entitled to immediate possession, a position wholly inconsistent with a recognition of any right in Duckett & Company or its receiver. Aside from the fact that the receiver seems to have acquiesced in this claim, upon the authority of the cases cited no promise to pay can be implied.

In *Omnia Commercial Company v. United States*, 261 U. S. 502, the Government, for war purposes, requisitioned the entire production of a steel manufacturer, rendering impossible and unlawful of performance an outstanding contract between a manufacturer and a customer. It was held that the customer's rights were not taken by the Government, but frustrated by its lawful action. That case was also an appeal from the Court of Claims. A question was raised in that case as to the statutory authority of the officer who made the order of requisition and gave the directions respecting noncompliance with the contract, but this Court assumed, for the purposes of the case, that he was authorized. Mr. Justice Sutherland, delivering the opinion of the Court, pointed out that the contract in question was property within the meaning of the Fifth Amend-

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ment, and if taken for public use the Government would be liable, but that destruction of or injury to property is frequently accomplished without a taking in the constitutional sense; that an appropriate exercise by a State of its police power is consistent with the Fourteenth Amendment, although it results in serious depreciation of property values; that the United States may, consistently with the Fifth Amendment, impose, for a permitted purpose, restrictions on property which produce like results; that the provision of the Fifth Amendment has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power, and that for consequential loss or injury resulting from lawful governmental action the law affords no remedy. In the course of the opinion it was said (page 511):

In exercising the power to requisition, the Government dealt only with the Steel Company, which company thereupon became liable to deliver its product to the Government, by virtue of the statute and in response to the order. As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated, but ended.

And at page 513:

In the present case the effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the Government.

The Government took over during the war railroads, steel mills, shipyards, telephone and

telegraph lines, the capacity output of factories, and other producing activities. If appellant's contention is sound the Government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things.

The conclusion of the Court in that case was based upon an exhaustive examination of authorities, both American and English, and would seem to be decisive of the questions here presented.

The effect of the requisition of the Bush Terminal was to bring existing contracts which its owners had made to an end, not to keep them alive for the use of the Government; or if the position taken by Duckett & Company after the Government's use had ended was correct it may be that instead of bringing Duckett & Company's lease to an end it merely "suspended temporarily the lease." It can not be that the Government, in the emergency existing on January 1, 1918, can be held to have been under the necessity of going through the property of the Bush Terminal Company, requisitioning berthing space for one ship from one tenant and for another ship from another tenant, and warehouse space from various tenants. What it did was to requisition the property, and when it had done so it assumed the rights of ownership; settled with the Bush Terminal Company, and proceeded under the distinct claim that its action gave

it rights to which those having existing contracts with the Bush Terminal Company must bow.

As the Court of Claims said (page 25):

We can not assent to the theory that if the President for war purposes took from the owner the use of a large office building, occupied by many tenants, such a taking became the basis of an additional implied contract as between the United States and each tenant.

While the record does not show affirmatively that any action was taken by the receiver based upon a claim that property in his charge was being appropriated by the Government for which he expected payment, there is enough to warrant the inference that the claim finally made in the Court of Claims, and now made here, is the result of an afterthought, and this has an important bearing upon the question of a contract implied in fact. It is to be remembered that the receiver was an officer of the Court, and presumably did whatever his duty required him to do. It appears from the memorandum of the Court of Claims denying the motion for a new trial that there was something in the evidence relating to a claim made by the receiver to the Board of Appraisers; that the Court acted deliberately in omitting such matter from the Findings, and that the matter then sought to be incorporated in the Findings was not asked by the plaintiff in its original requests. (Pages 28-29.) The Court says (page 29), referring to the plaintiff:

It did not originally, and it does not now, ask to have the Findings show that its receiver

did in fact file a claim with this board of appraisers and that this claim was disallowed. The fact in this respect is that upon argument of this case the plaintiff sought to, and, so far as it could, did, repudiate the claim filed by the receiver with this board. The counsel then stated to the court that the receiver did not properly understand the situation when he filed that claim, and that plaintiff should not be bound thereby.

Whatever was done or omitted by the receiver may not be important except for its bearing upon the question of fact whether a contract to pay can be inferred from what was or was not done by the parties at the time. The nature of the receivership does not appear except (p. 9) that it was a temporary receivership; and we must remember that the Bush Terminal people voluntarily agreed with the United States for a rental for this pier at less than half the amount reserved in Duckett & Company's lease. It is not improbable that the receiver regarded this lease as a liability rather than an asset, and was glad to be relieved of it by the action of the Government. At any rate, there was no protest by the receiver, no claim that property entrusted to his care by the court was being taken from him, and no promise on behalf of the United States to pay him.

This view is confirmed when, months afterwards, and when the transaction is all over, we find the plaintiff itself, not the receiver, writing to the Terminal Company that it is content to stand upon the fair ground that the emergency under which the Govern-

ment seized the pier "suspended temporarily the lease between us." So we say that the Court of Claims was right in holding that the facts showed no implied contract imposing liability upon the United States.

The Court of Claims, in its opinion (page 25), suggests whether the taking over of the Bush Terminal from the owner did not terminate the leases of the tenants, and refers to the case of *Gates v. Goodloe*, 101 U. S. 612, saying that while the question decided went only to the liabilities of the lessee to pay rent—

the authorities cited go far to sustain the conclusion that in such an event private contracts inconsistent with the exercise of a sovereign right are dissolved.

In the case at bar, the act of August 29, 1916, was in force at the time the Duckett lease was made (September 19, 1916). It seems to us that all contracts relating to transportation systems must have been made subject to the provisions of that act. In other words, that it must be held that the provision of the act was in effect written into and became a part of all subsequent contracts.

CONCLUSION

The judgment should be affirmed.

JAMES M. BECK,

Solicitor General.

ALFRED A. WHEAT,

Special Assistant to the Attorney General.

OCTOBER, 1924.